# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 620

CLEONA HOOPER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. A7–A8) and the memorandum opinion of the district court (Pet. A1–A7) are not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 2, 1970. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including Sunday, August 30, 1970. The petition was filed on August 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



406-671—70

## QUESTIONS PRESENTED

1. Whether the affidavit submitted to the Commissioner established probable cause for the issuance of the search warrant.

2. Whether the courts below properly held that the privilege against self-incrimination could not be asserted as a defense to petitioner's prosecution for violation of the federal tax laws relating to liquor.

## STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on two counts charging the possession and concealment of non-tax paid liquor and property unlawfully used in connection therewith in violation of 26 U.S.C. 5686(a) and 26 U.S.C. 5601 (Pet. A–28). He was sentenced to a prison term of five years on count two and fined $2,500 on count one. The court of appeals affirmed (Pet. A–8).

The evidence showed that in December 1968, information was received by the Alcohol, Tobacco, and Firearms Division of the Department of the Treasury in Greenville, Tennessee, that petitioner was concealing non-tax paid alcohol in a shed at the rear of his home and that he was trafficking the liquor principally on Sundays (Tr. 18–19; Pet. A–35). Based on this information, federal agent Childer, who had seven years investigatory experience, maintained a surveillance of petitioner's residence on Sunday, De-

tember 8, 1968. He observed what appeared to be the loading of liquor from the shed and the back porch of the house into the trunk of an automobile; the case and jugs used were the kinds used by liquor law violators. The agent's affidavit for the warrant precisely detailed these activities, and further stated that petitioner was a "known liquor law violator with a federal criminal record and a current reputation of violating the whiskey laws" (Pet. A 35, 34–37). A search warrant based on this affidavit was obtained on December 13, 1968; and was executed on December 15, 1968 (Pet. A 32–33).

Following a hearing on petitioner's motion to suppress, the district court concluded that the affidavit disclosed probable cause for the search warrant. While the court indicated its concern as to the method of execution (Pet. A 5–6), and noted particular concern as to the inconsistency in agent Childer's testimony as to when petitioner was given a receipt for the items seized (Pet. A 2–3, 6), the court concluded that "in totality the search and seizure herein were not unreasonable" (Pet. A–7).

At trial, Agents Whitlow and Stratigus both testified that they found, in a small shed at the rear of petitioner's house, 111 gallons of non-tax paid liquor, 82 cases of one-half gallon glass jars, 66 one gallon jugs, a 200 gallon mixing vat, a double felt filter, a 20 gallon wash tub, and 91 pints of isopropyl alcohol (Tr. 10–13, 27–31).

## ARGUMENT

I. Relying on *Spinelli* v. *United States*, 393 U.S. 410, petitioner argues that the affidavit did not set forth probable cause for the issuance of the search warrant. Although the affidavit (Pet. A 34–37) was not specific as to the source of the information about petitioner's illegal activities,[1] the personal observation of agent Childer tended to confirm that such information was based on more "than a casual rumor", and that it was obtained by the informant "in a reliable way" *Spinelli* v. *United States*, 393 U.S. 410, 416–417. The agent's surveillance thus corroborated that the informant knew the location of the non-tax paid liquor and the day of the week on which the loading operations principally occurred (Pet. A 35–37). See *Draper* v. *United States*, 358 U.S. 307. The experienced agent further concluded from his visual observations that the box and plastic jugs that he saw being transferred from the shed to the trunk of the waiting automobile were "similar" to the types of containers used in that area "to package non-taxpaid distilled spirits" (Pet. A–36). Considering in addition the agent's knowledge that petitioner was a "known liquor law violator with a federal criminal record and a current reputation of

[1] The affidavit of agent Childer stated that the information was both "reliable" and "official." The record shows, however, that this apparently refers to the fact that the information had been previously communicated to Childer by agent Whitlow, who initially received it (Tr. 18–21). We do not rely, therefore, on the characterization of the information in the affidavit as "official". While the actual underlying source of the information is not clear, it apparently was an informant (See Tr. 22).

violating the whiskey laws" (Pet. A-35),[2] there was ample probable cause, as both courts below found, for the issuance of the warrant. Accordingly, we believe the writ should be denied. Nevertheless, we recognize that the Court may wish to defer disposition until after it decides *United States* v. *Harris*, No. 30, this Term.

None of petitioner's other challenges to the warrant has merit. That a copy of the warrant and a receipt for the items seized were not given to petitioner directly after the search, as Rule 41(d) F.R. Crim P. directs, but instead were mailed to him the next day, constituted a technical defect which did not invalidate the otherwise lawful search. See *United States* v. *Haskins*, 345 F. 2d 111 (C.A. 6); *Evans* v. *United States*, 242 F. 2d 534 (C.A. 6), certiorari denied, 353 976. Equally insubstantial is the contention that there was an unreasonable delay in procuring the warrant. The agent made the visual observation on December 8 and obtained the warrant on the 13th; it was executed two days later. Less than ten days thus elapsed from the time of probable cause to the date of execution. See Rule 41(d). Finally, as the district court specifically found, the warrant itself (Pet. A 32-33) was sufficiently specific as to the items to be seized and the places to be searched (See Pet. A-1).

2. Petitioner further argues that the Fifth Amendment privilege against self-incrimination precluded

[2] This knowledge regarding petitioner—particularly the existence of a federal criminal record—was clearly more concrete than the reputation evidence found to be entitled to no weight at all in *Spinelli*, *supra*, 393 U.S. at 414.

his conviction. No valid Fifth Amendment defense arises, however, from the federal statutory scheme relating to liquor. That scheme is aimed at limiting participation in the liquor industry to those who engage in lawful activities; it is not a device for obtaining incriminating disclosures nor do the statutory provisions affect only a select group inherently suspect of criminal activities. All the courts of appeals to which the instant contention has been made have rejected it. *E.g.*, *United States* v. *Fricano*, 416 F. 2d 434 (C.A. 2); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *United States* v. *Whitehead*, 424 F. 2d 446 (C.A. 6).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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*Solicitor General.*

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OCTOBER 1970.

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[2] Petitioner raises the same issue in a petition for a writ of certiorari from an affirmance of another conviction in No. 640, this Term. The contention is also posed in the petition in *Grooms* v. *United States*, No. 639, this Term.

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